

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-214169

DATE: April 24, 1984

MATTER OF: Phaostron Instrument & Electronic Company,
Inc.

DIGEST:

1. Where IFB identifies previously approved source controlled components and requires bidder to certify that it will furnish only those components, bidder's failure to certify is a material deviation and requires rejection of its bid as nonresponsive.
2. Post-opening procurement actions by contracting agency does not estop the agency from rejecting a nonresponsive bid when required to do so by law.

Phaostron Instrument & Electronic Company, Inc. protests the rejection of its bid as nonresponsive to the source control certification requirement of invitation for bids (IFB) No. DAAA09-83-B-4957 issued by the U.S. Army Armament Munitions and Chemical Command, Rock Island, Illinois, to procure firing device kits. Phaostron essentially contends that the Army is estopped by its conduct after bid opening to deny the responsiveness of the Phaostron bid and that its failure to complete the certification is a minor informality which can be waived. Additionally, Phaostron protests the subsequent cancellation of the solicitation. We deny the protest.

The IFB specifications included numerous source control drawings, each drawing typically bearing the following legend:

"Only the item described on this drawing, when procured from the vendor listed hereon is approved . . . for use in the application(s) specified A substitute item shall not be used without prior approval"

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In addition, the solicitation contained a separate certification clause for source controlled items which provided:

"K-10 Certification of Source Controlled Item or Components

"This solicitation contains a requirement for bidders/offerors to supply an item or component(s) that is (are) identified as source controlled. The bidder/offeror represents and certifies as part of his bid/offer that: (check box)

"[] The item/component(s) being offered will be obtained from only the approved source(s) identified on the source control drawing(s).

"Caution: If this is a formally advertised procurement, failure to complete this certification will render the bid nonresponsive."

Four firms responded to the solicitation. Because Phaostron was low, the contracting officer requested and received a preaward survey of Phaostron. Approximately 3 months after bid opening and shortly before the anticipated award of the contract to Phaostron, the Army discovered that Phaostron had failed to check the box in Clause K-10, quoted above. The contracting officer then concluded that Phaostron's bid was nonresponsive and thereafter canceled the solicitation because he considered the remaining unexpired bid to be unreasonable as to price.

We understand that the Army requires the certification to alert bidders to the fact that only certain approved components will fulfill the government's requirements and to enable the government to ascertain that the sources of the components which the bidder is offering have been approved at the time of bid opening. We also understand that under solicitations including only the drawing legend and not the certification clause the Army has found that contractors manufacture and deliver products which contain items that have not been approved, resulting in rejection of the products and lengthy delays in the procurement. Accordingly, the certification requirement was imposed on bidders to avoid this problem.

Phaostron argues that the Army's rejection of its bid was arbitrary and capricious and that the Army's belated determination that its bid was nonresponsive constitutes "gross impropriety . . . tantamount to fraud." Phaostron contends that the Army recognized the responsiveness of its bid by the following actions, among others, which occurred after bid opening: 1) the contracting officer requested and received verification of Phaostron's bid price; 2) the preaward survey that was conducted showed that Phaostron was a responsible contractor which had obtained quotes on all required materials and, specifically, that "source control and specification control items had been properly identified"; and 3) various inquiries were made by the Army concerning possible quantity reductions and bid extensions. Under these circumstances, Phaostron believes that its failure to certify was a minor redundant informality which should have been waived since the post-opening events clearly reflected its intent to be bound by the source control requirement.

The result in this case is controlled by our decisions in B.K. Instrument, Inc., B-212162, November 30, 1983, 83-2 CPD 627 and MVI Precision Machining, Ltd., B-210730, September 27, 1983, 83-2 CPD 382, both of which also involved the rejection of a bid as nonresponsive because of the bidder's failure to check the box in a clause identical to K-10. In those cases, we stated that a bidder's failure to complete the certification clause affected its obligation to perform in accordance with the IFB because it is only the certification, and not the legend on the source control drawings, which limits a bidder to sources approved prior to bid opening. The legend on the source control drawings simply states that substitute items shall not be used without the agency's approval; thus, bidders would be able to propose the use of substitute items after bid opening. Under the certification, however, a bidder is obligated to furnish only items from approved sources "identified on the source control drawing(s)," that is, approved sources listed on the drawings at the time bids are opened. Consequently, because the certification clause imposes a different obligation than that set forth on the individual source control drawings, Phaostron's bid lacking the certification cannot be considered to be an unequivocal offer to deliver exactly what is called for in the solicitation.

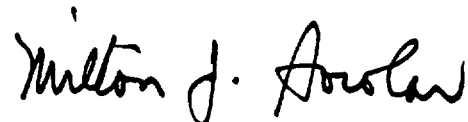
Further, the deficiency in Phaostron's bid is material and not subject to waiver as a minor informality. A material deviation is one which affects the price, quality,

or quantity of goods or services offered. B.K. Instrument, Inc., supra. The certification clause is to ensure that the items provided will have been tested and approved as meeting the government's needs and thus this requirement clearly will affect the quality of the product and in all likelihood the price also.

Additionally, we find no merit to Phaostron's contention that post-opening events precluded the Army from rejecting its bid. First, the responsiveness of a bid must be determined from the material available at bid opening, so that, for example, post-opening explanations cannot be considered to correct a nonresponsive bid, even if a lower price could be obtained by accepting the corrected bid. Sunsav, Inc., B-205004.2, November 29, 1982, 82-2 CPD 476. Second, we have consistently held that contract actions of government officials do not estop an agency from rejecting a nonresponsive bid where, as here, the agency is required to do so by law. See International Salt Company, B-200128, January 7, 1981, 81-1 CPD 142; Edward E. Davis Contracting, Inc., B-188986, November 29, 1977, 77-2 CPD 419; Medi-Car of Alachua County, B-205634, May 7, 1982, 82-1 CPD 439. Thus, we have no basis to disturb the Army's determination that Phaostron's bid was nonresponsive.

In view of the above, cancellation was proper since the remaining unexpired bid was found to be unreasonably priced. See Defense Acquisition Regulation § 2-404.1(b) (vi).

The protest is denied.



Acting Comptroller General
of the United States